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Introduction

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INTRODUCTION

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1 The drive to harmonise the recognition and enforcement of foreign judgment rules has gained momentum in recent years. First, there is the revival of the Judgments Project by the Hague Conference on Private International Law. The Judgments Project aims to develop a broad ranging convention on the recognition and enforcement of judgments in civil and commercial matters.[1] Secondly, the Hague Convention of 30 June 2005 on Choice of Court Agreements ("HCCCA"), which was concluded in 2005, came into force on 1 October 2015. The HCCCA was born out of work done at earlier negotiations on the Judgments Project. When negotiations stalled, it was decided that work on choice of court agreements in a business to business context should be prioritised. One of the key principles of the HCCCA is that a judgment rendered by a chosen court would be recognised and enforced in the other Contracting States to the HCCCA. It is to date part of the law in 29 countries,[2] with a further four countries[3] having signed, but not ratified, the Convention. Thirdly, there are also efforts which are focused specifically on the Asian region such as the Asian Principles of Private International Law. This is an endeavour by a group of private international law scholars in ten jurisdictions to come up with model laws on various aspects of private international law, including the recognition and enforcement of foreign judgments.[4]

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1 Information on the Judgments Project can be found at https://www.hcch.net/en/projects/legislative-projects/judgments (accessed 9 October 2017).

2 The European Union Member States (excluding Denmark), Mexico and Singapore.

3 China, Montenegro, the US and Ukraine.

4 Weizuo Chen & Gerald Goldstein, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" (2017) 13 *Journal of Private International Law* 411.

2 The need for harmonisation of the foreign judgment rules is particularly acute in Asia as the region moves towards closer economic integration and increasing cross-border trade. The ASEAN Economic Community ("AEC") was established in 2015 with the aim of creating a highly integrated and cohesive ASEAN economy.[5] China's One Belt One Road initiative ("OBOR") seeks to rejuvenate the land and sea trade routes that linked China to the rest of Asia, Africa and Europe in the past.[6] These two initiatives involve countries which collectively represent a significant percentage of the global market and global population. The AEC and OBOR would lead to an increase in the number and size of cross-border transactions, not just within Asia, but also with neighbouring countries and major trade partners. This would, in turn, naturally lead to a rise in cross-border litigation and instances where the judgment debtor's assets may be located in a jurisdiction other than the jurisdiction in which litigation took place. Harmonisation of the foreign judgment rules in Asia thus appears to be no mere idealistic undertaking but is essential to support Asia's ambitious economic plans.

3 It was against this backdrop that the project was conceived. Apart from purely economic advantages, harmonisation would add clarity to the law. The precise rules in some countries are difficult to lay down, as there may have been little legislative or judicial consideration of this area of law. Further, a diversity of rules may be confusing for litigants, who would potentially have to navigate both substantial and subtle differences in the various laws. Harmonisation would obviously increase legal certainty and increase the portability of judgments in the region.

4 Given the clear benefits of harmonisation, the overall objective of the project is to determine whether it is possible to harmonise the law on the recognition and enforcement of foreign judgments in Asia, and if this can be answered in the affirmative, the best means by which harmonisation may be achieved. The project covers the ASEAN

5 Further information on the ASEAN Economic Community can be found at http://asean.org/asean-economic-community/ (accessed 9 October 2017).

6 Further information on the One Belt One Road Initiative can be found at http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative/obor/en/1/1X3CGF6L/1X0A36B7.htm (accessed 9 October 2017).

Member States, Australia, China, India, Japan and South Korea. It is to be conducted over two phases. The first phase is a mapping exercise to identify the existing rules in the countries within the scope of the project. This compendium of country reports is the output of the first phase of the project.

5 The country reports consider the recognition and enforcement of foreign judgment rules in civil and commercial matters. The country reports do not deal with foreign judgment rules on family law matters, although some reporters have referred to private international law cases on family law where these cases establish a point of general principle. The rules relating to *in personam* and *in rem* judgments, as well as monetary and non-monetary judgments, are all covered.

6 While detailed analysis of the areas of commonality and differences between the laws of the various countries will be left to the second phase of the project, it is possible to offer some preliminary, and general, observations at this juncture.

7 The countries within the scope of this project are a mix of common law countries, civil law countries and hybrid systems. The common law countries all largely adhere to the English common law framework on foreign judgments. Some differences still exist, for example, on whether default judgments are final and conclusive in nature, and on the scope of the defence of fraud. Nevertheless, save for a handful of issues, it is fair to say that there are no significant differences when one compares the rules of each common law country which is covered in this project.

8 The civil law countries demonstrate a much greater disparity in their laws. For example, the issue of jurisdictional competence of the foreign court is variously tested with reference to the law of the foreign court itself or to the law of the forum. Further, at one end of the spectrum, there are countries which do not appear to recognise and enforce foreign judgments at all. Others would only recognise and enforce a foreign judgment if there is a treaty on that issue between the country which is asked to enforce the judgment and the country from which the judgment stems. As an alternative to a treaty relationship, the remaining civil law countries either require it to be shown that at least one of its judgments has been enforced by the other country in the past,

or, that it is likely that its judgment would be enforced by the other country if the latter is called on to do so.

9 The preceding paragraph alludes to the requirement of reciprocity, which is a prerequisite to enforcement under the civil law systems. This requirement may be thought to be one of the biggest stumbling blocks to harmonisation between the common law and civil law systems. However, it is possible to discern a gradual loosening of how reciprocity is understood and implemented in some of the civil law countries. In fact, it has been argued that reciprocity is due to "become a paper tiger with trimmed claws".[7] Further, while reciprocity is not a requirement under the common law rules, the common law countries in this study either have dedicated statutes or provisions in a general code on civil procedure which deal with the enforcement of foreign judgments from "reciprocating" countries or territories. Designation as a "reciprocating" country or territory is determined by the relevant governments.[8]

10 This brings me to the next point. When one compares the framework of the law in the common law and civil law countries, shared criteria for the recognition and enforcement of a foreign judgment can be identified. The requirement of reciprocity, on one view, is not unique to the civil law countries. The requirements of jurisdictional competence on the part of the foreign court and of finality of the foreign judgment are present in both systems, albeit the criteria may be interpreted differently. There is also a significant overlap in terms of the defences that are permitted.

11 Of the 15 countries that are covered in this compendium, 13 of them accept that foreign judgments are entitled to recognition and enforcement.[9] Even in the two countries[10] where a litigant has to sue

7 Béligh Elbati, "Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite" (2017) 13 *Journal of Private International Law* 184 at 218.

8 While the statutory schemes provide a more direct procedural mechanism for the enforcement of a foreign judgment, the foreign judgment still has to fulfil certain criteria to qualify for enforcement under the schemes.

9 At the very least, in principle, even if it has not occurred in practice.

10 Indonesia and Thailand.

afresh on the same cause of action despite a prior foreign judgment in his favour, a foreign judgment may have effect in the local proceedings as it can be introduced as evidence. This state of affairs, coupled with the presence of shared criteria for the recognition and enforcement of foreign judgments, is promising for convergence purposes. Of course, one cannot overlook the fact that significant differences do exist, but there is cause to believe that harmonisation of the recognition and enforcement of foreign judgment rules in Asia is no pipe dream. Phase 2 of this project will grapple with this issue.

12 It remains for me to record my gratitude to various persons involved in this project. I would like to thank The Honourable Justice Andrew Phang, Judge of Appeal of the Supreme Court of Singapore, who as the project advisor provided wise counsel and carefully shepherded this project. Professor Yeo Tiong Min, Academic Director of the Asian Business Law Institute ("ABLI"), and Associate Professor Pearlie Koh, have provided helpful input and advice along the way. The contributions of Mark Fisher and Sarah Archer, the two successive Deputy Executive Directors of ABLI (on secondment from Jones Day), have been instrumental to the completion of the first phase of the project. Thanks are also due to the team at Academy Publishing, and to Jerald Soon Shao Wei and Ava Wang Yuxuan, both of whom provided research assistance for the project. Last but certainly not least, I would like to express my deepest gratitude to each and every country reporter involved in this project. Their generosity in lending their time and expertise to this project is very much appreciated.